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**Intellectual Property and the Common Law in Scotland c.1700-c.1850**

Hector MacQueen



# **INTELLECTUAL PROPERTY AND THE COMMON LAW IN SCOTLAND C.1700-C.1850**

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FORTHCOMING IN:

The Common Law of Intellectual Property; Essays in Honour of David Vaver, eds L Bently, G D'Agostino and C Ng (Hart Publishing, 2009).

**Abstract:** A significant Scottish dimension is apparent in the development of what we would now call intellectual property in the United Kingdom after the Union of 1707. With both patents and copyright under the Statute of Anne, however, that Scottish dimension was always seen in the context of the single market created by the Union; and this was occasionally reinforced by House of Lords cases as well as by the legislature. In Scotland itself there were also issues about how to understand these developing rights within the systematics of Scots law, in particular the doctrine of real rights. While this did not prevent the development of a unified substantive patent law for the United Kingdom long before the abolition of separate Scots and English patents in 1852, there were significant effects in the debate about the existence of rights at common law, beyond grants made under the royal prerogative or by virtue of United Kingdom legislation. The effects were not limited to the literary property arena. The notions of protecting reputation and privacy rather than rights of property also helped from early in the nineteenth century to follow the English development of a concept of a right to protect confidentiality, preventing or sanctioning the taking and use or disclosure of another's confidential information. Similarly the unauthorised use of badges of another's trading identity and reputation would provide the platform from which Scots law would move in the second half of the nineteenth century to use the English concept of passing off. But in both common law developments it generally remained clear (as it did not with literary property) that their basis in Scots law was in personal rights, whether by way of delict or contract, and not in any form of property in the confidential information or the badges of identity. It was, however, always a comfort for the Scottish courts that here, as with patents and copyright, the results produced by this different approach were generally in line with those that would be reached in England. The United Kingdom was the inescapable backcloth to the development of intellectual property law.

**Keywords:** law, legal history, intellectual property, patents, copyright, real rights, Scotland



## **Intellectual Property and the Common Law in Scotland c.1700-c.1850\***

This paper seeks to chart, in a tentative and preliminary way, some of the main staging posts along the route by which the Scots law of intellectual property came to be largely subsumed within a United Kingdom legal framework in the period between roughly 1700 and 1850.

### **(1) The 1707 Union and the Statute of Anne**

The origins of a United Kingdom intellectual property law lie in the two critical moments which created the United Kingdom: first, the Union of the Crowns in 1603 under which King James VI of Scotland inherited the English throne and became King James I of England; and second, the Treaty and Acts of Union in 1707. While the 1603 Union left in place two separate kingdoms each under a Crown which simply happened both to be held by the same person for the next century, Articles I and II of the 1707 Union created a single united kingdom and Crown of Great-Britain. Article III provided for a single Parliament, while Article IV established a legal framework for a single market with full freedom of trade between Scotland and England.

Article VI stated that -

... all parts of the United Kingdom, for ever, from and after the Union, shall have the same Allowances, Encouragements and Drawbacks, and be under the same Prohibitions, Restrictions, and Regulations of Trade ... [T]he Allowances, Encouragements, and Draw-backs, Prohibitions,

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Restrictions, and Regulations of Trade ... settled in England, when the Union commences, shall, from and after the Union, take place throughout the whole United Kingdom.

But this drive for a single market was not thought to make necessary the general unification of the laws and legal systems of England and Scotland. The existence and jurisdiction of the Scottish Court of Session and High Court of Justiciary were preserved 'in all time coming'. But appeals from the Scottish courts to the House of Lords in its judicial capacity became firmly established although nothing was said of this in the Union Articles; this would later have significant effect in the development of intellectual property rights in Scotland. Under Article XVIII Scots law itself was to 'remain in the same force as before', albeit 'alterable by the Parliament of Great-Britain'. This was however qualified in various ways by other provisions in the Article. '[T]he Laws concerning Regulation of Trade ... [were] to be the same in Scotland, from and after the Union, as in England'. Article XVIII also sought to regulate the Parliamentary power to alter Scots law: only with 'the Laws which concern public Right, Policy, and civil Government' might the object of the change be to make the law 'the same throughout the whole United Kingdom', whereas 'no Alteration [might] be made in Laws which concern private Right, except for evident Utility of the Subjects within Scotland'.<sup>1</sup>

An early manifestation of the power of the Parliament of Great Britain under Article XVIII was the Statute of Anne 1710, which introduced the concept of literary property and applied throughout the United Kingdom. Before the 1707 Union the Scottish copyright system was based upon government grants to publishers, underpinned by the royal prerogative, of exclusive privileges to

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<sup>1</sup> For discussion of the meanings of public and private right see JD Ford, 'The Legal Provisions in the Acts of Union' (2007) 66 *Cambridge LJ* 106, 108-118; JW Cairns, 'The Origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair' (2007) 11 *Edinburgh LR* 300, 313-326

print and import particular works.<sup>2</sup> Authors too could apply for such privileges.<sup>3</sup> The Scottish Privy Council provided both the granting body to which application for privileges was made, and the forum in which disputes about the scope of the privileges were determined. The grants were increasingly in standardised forms, and typically provided for a 19-year period of exclusivity as well as search powers for the right-holder to root out infringing copies.

This system was however undermined as an immediate consequence of the 1707 Union, when the Scottish Privy Council was abolished by statute from 1 May 1708.<sup>4</sup> This event provided a reason for introducing in 1709 what became the Statute of Anne; in this respect at least, some form of exclusivity to replace what had just been lost was for the 'evident utility' of Scottish authors and publishers if it was not actually a matter of 'public right' to make the grant of literary privilege uniform throughout the newly united kingdom.<sup>5</sup> The Scottish dimension was certainly provided for in the 1710 Act. The Court of Session was given jurisdiction 'if any person or persons incur the penalties contained in this Act, in that part of Great Britain called Scotland'; the deposit of copies of registered works was required in the libraries of the Faculty of Advocates and the four Scottish universities via the Stationers Company; and book price regulatory powers in Scotland were given to the Lord President, the Lord Justice General,<sup>6</sup> the Lord Chief Baron of the Scottish Exchequer and the Rector of the College (i.e. University) of Edinburgh.

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<sup>2</sup> A Mann, *The Scottish Book Trade 1500-1720* (East Linton, Tuckwell Press, 2000), ch 4.

<sup>3</sup> Mann, *Scottish Book Trade*, 113-4.

<sup>4</sup> Union with Scotland (Amendment) Act 1707, 6 Anne c.40, s.1.

<sup>5</sup> Mann, *Scottish Book Trade*, 123.

<sup>6</sup> The offices of Lord President and Lord Justice General were at this time held by different persons; they were merged in one person from 1836 on.

## **(2) The post-Union Scotch patent**

The impact of the 1707 Union upon the grant of letters patent for invention has been much less studied than its effect on copyright. In England long before 1707 letters patent were regularly granted under the king's Great Seal as an exercise of the royal prerogative in favour of the 'true and first inventors' of 'new manufactures', giving them the exclusive monopoly right to work or make their inventions for up to fourteen years. The practice was recognised as lawful under the Statute of Monopolies 1623, which had declared the grant of monopolies otherwise to be 'utterly void and of none effect'. The position in pre-1707 Scotland is much less clear, although the Scottish Crown certainly did grant monopolies of various kinds and durations under the Great Seal of the kings of Scots. Typically, however, these were not for inventions so much as the protection and support of those speculatively investing in the exploitation of the country's natural resources or the establishment in Scotland of industries already well-known elsewhere.<sup>7</sup> There was no Scottish equivalent to the Statute of Monopolies, although in 1641 an Act 'dischargeing monopolies' was passed by a Parliament openly hostile to royal prerogative, especially in matters of religion and worship, and in consequence determined to clip the wings of King Charles I as much as possible in order to subject him to a binding covenant with his people.<sup>8</sup> The 1641 Act referred to the 'great hurt and prejudice sustained by sundry of his majesty's lieges by the monopolies used and exacted within this kingdom' and ordained 'all ... patents ..., purchased or to be purchased, for the benefit of particular persons in prejudice of the public to cease and be ineffectual in all time coming.'<sup>9</sup> After the Restoration, however, the Scottish Parliament rescinded all previous legislation

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<sup>7</sup> See I Whyte, *Scotland before the Industrial Revolution: an Economic and Social History c.1050-c.1750* (London, Longmans, 1995), 274-9, 288-90.

<sup>8</sup> See generally M Lynch, *Scotland: A New History* (London, Century, 1991), 265-73.

<sup>9</sup> KM Brown et al (eds), *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007, accessible at <http://www.rps.ac.uk>), 1641/8/192.

purporting to restrict the royal prerogative,<sup>10</sup> leaving the regulation of monopolies under letters patent to the common law and custom.

Later in the eighteenth and nineteenth centuries, the conventional wisdom amongst Scots lawyers was that, while monopolies were prohibited at common law,<sup>11</sup> Article VI of the 1707 Union had had the effect of legitimating patents for inventions and applying the Statute of Monopolies in Scotland, thus making the law on the subject the same in both kingdoms.<sup>12</sup> The accuracy of this belief can only be determined from a more thorough investigation of the grant of patents in Scotland both before and after 1707 than is possible in this paper. The Act of Union made provision for a Great Seal of the United Kingdom in its Article XXIV, but also laid down that there should be a royal seal in Scotland for 'Offices, Grants, Commissions, and private Rights within that Kingdom'. To take effect in Scotland patents had to be sealed with this Scottish Seal, and there continued to be separate Scottish (or Scotch, as they were more commonly known by the nineteenth century) and English patents after 1707, with no room for single grants taking effect across the whole United Kingdom. This would remain the position until the Patent Law Amendment Act 1852, which abolished separate Scottish and English (and Irish) patents, and replaced them with a patent for the whole of the United Kingdom. Until then, however, Scottish patents for inventions were expressed to have effect 'in that part of the realm of Great Britain known as Scotland'. There was, however, nothing to stop inventors in each jurisdiction applying

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<sup>10</sup> Ibid., 1661/1/16.

<sup>11</sup> Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland* (Edinburgh, 1751, henceforth Bankton, *Institute*), I, xix, 11 (also available in a reprint as vols 41-43 in the Stair Society series, edited with an introduction by WM Gordon); GCH Paton (ed), *Baron David Hume's Lectures 1786-1822* (6 vols, Edinburgh, Stair Society, 1939-58, henceforth Hume, *Lectures*), vol 4, 60-61; GJ Bell, *Principles of the Law of Scotland* (1st edn, Edinburgh, 1829; 4th edn (the last produced by Bell), Edinburgh, 1839), § 1348. Hume's lectures, last delivered in the 1821-1822 academic session and unpublished until the twentieth century, nonetheless had considerable contemporary influence.

<sup>12</sup> See e.g. *Roebuck and Garbett v Stirlings* (1774) 3 Pat 346, 348; GJ Bell, *Commentaries on the Mercantile Jurisprudence of Scotland*, 7th edn (Edinburgh, 1870), vol 1, 105. The 7th edition has been used, since it reprints the text of the 5th edition of 1835, the last produced by Bell himself. The work first began to be published in 1800. See also Bell, *Principles*, § 1349; *Neilson v Househill Coal and Iron Co* (1842) 4 D 470, 475. Cf Hume, *Lectures*, vol 4, 61.

for patents in both parts of the realm, and this seems to have been common (although by no means universal) practice by the beginning of the nineteenth century.<sup>13</sup>

Scottish practice in relation to the grant of patents for inventions began to develop significantly after the Union. Between 1712 and 1852 the 'paper' register of the Great Seal was used to record 'an increasing number of patents for inventions'.<sup>14</sup> The 'paper' (as distinct from 'parchment') register had been established as long before as 1596, to be a record of temporary or redeemable rights, with the parchment register being thenceforward reserved for grants in perpetuity, typically of land. Applications for patents were made through the Home Office in London, a warrant under the royal sign manual authorising the grant to pass the great seal. An application for a Scottish patent would be remitted to the Lord Advocate (the Scottish Law Officer equivalent to the English Attorney General) for an opinion on whether a patent might lawfully be granted. If the opinion was favourable, then the warrant was issued and the grant would pass the Seals.<sup>15</sup> It seems unlikely that this entailed any difference between Scottish and English law and practice on patent grants, however. By the beginning of the nineteenth century, if not well before, the normal period of the grant was 14 years, as in England, and the grantee had to lodge a detailed specification of the invention in the Scottish chancery within four months. A post-1750 increase in Scots patent grants<sup>16</sup> can almost certainly be linked to the Industrial Revolution in Scotland, the beginnings of which are usually found in the second half of the eighteenth century.<sup>17</sup> Inward investment from England was important in this development,<sup>18</sup> and it is possible that the growth

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<sup>13</sup> HI Dutton, *The Patent System and Inventive Activity during the Industrial Revolution 1750-1852* (Manchester, Manchester University Press, 1984), 35.

<sup>14</sup> *Guide to the National Archives of Scotland (Scottish Record Office)* (Edinburgh, Stair Society, 1996), 84.

<sup>15</sup> See further Hume, *Lectures*, vol 4, 62, and Bell, *Commentaries*, vol 1, 105. For the costs see Dutton, *Patent System*, 35.

<sup>16</sup> *Guide*, 88-89.

<sup>17</sup> See generally CA Whatley, *The Industrial Revolution in Scotland* (Cambridge, Cambridge University Press, 1997).

<sup>18</sup> TM Devine, *The Scottish Nation 1700-2000* (London, Penguin, 1999), 116.

in use of patents in Scotland from 1750 was triggered by English patentees moving to protect their Scottish ventures also.<sup>19</sup>

The importance of keeping the substance of patent law the same each side of the border must have been reinforced by such developments. In the first reported Scottish patent case, *Roebuck and Garbett v Stirlings*, which reached the House of Lords in 1774,<sup>20</sup> the House of Lords upheld the interlocutors of the Court of Session to the effect that a patent obtained for an invention in Scotland was invalidated by proof of previous use in England even although there was no convincing evidence of such use in Scotland. Although patent litigation did not really take off in Scotland until after 1800,<sup>21</sup> numerous decisions thereafter up to 1850 make clear the continuing sense of the Scottish courts that, despite the split between Scottish and English patents, the law was essentially a unity north and south of the border with England, with a uniform approach to patent questions generally appropriate. This was not merely a matter of referring to English decisions and treatises like those of Collier, Davies, Godson and Webster, common though this was in Scottish cases and writing on the subject.<sup>22</sup> Unity cut to the very heart of substantive patent law on the issues of inventiveness, novelty and prior publication.<sup>23</sup>

So in *Brown v Kidston & Waters*<sup>24</sup> in 1852, a Scottish patentee's widow was refused interdict against parties alleged to be infringing the patent, because the patentee had also obtained an

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<sup>19</sup> See *Roebuck and Garbett v Stirlings* (1774) 3 Pat 346, where the appellant patentees were English entrepreneurs. On Roebuck and Garbett, see Whyte, *Scotland before the Industrial Revolution*, 305; Whatley, *Industrial Revolution*, 29; 'Roebuck, John, bap 1718-1794', *Oxford Dictionary of National Biography* (Oxford, Oxford University Press, 2004).

<sup>20</sup> *Roebuck and Garbett v Stirlings* (1774) 3 Pat 346.

<sup>21</sup> Hume, *Lectures*, vol 4, 62, cites four unreported patent infringement cases between 1800 and 1804 which appear to be the earliest known after the *Roebuck and Garbett* case in 1774.

<sup>22</sup> See e.g. *Hadden v Pirie & Co* (1823) 2 S 423 (NS 376); *Wilson v Black* (1847) 10 D 1; *Templeton v Macfarlane Brothers* (1847) 10 D 4, revd (1848) 10 D 796; as well as cases cited elsewhere in this article.

<sup>23</sup> The precedent of *Roebuck* nevertheless had to be reaffirmed as late as 1841 (*Brown v Annandale* (1841) 3 D 1189), despite its import being made clear in Bell, *Commentaries*, vol 1, 107-8.

<sup>24</sup> *Brown v Kidston & Waters* (1852) 14 D 826.

English patent in January 1840, some ten months before the Scottish grant, while a description of the invention had also been published in various journals, particularly the August 1840 issue of the *Mechanics Magazine* (which circulated in both jurisdictions). The interdict sought was granted at first instance by the Lord Ordinary, who held that the grant of a patent was evidence of a prima facie entitlement and thought it a ‘hypercritical plea’ to argue that publication of an invention in a magazine annulled a Scottish patent when there was no evidence that the invention had actually been used in Scotland. But on a reclaiming motion this was overturned by the Second Division, upholding the respondents’ argument that the Scottish patent, being subsequent to publication of the invention, was invalid. Even if England was technically a foreign legal system, publication in that jurisdiction could not be irrelevant in determining the novelty of an invention in Scotland. Publication in England was for the benefit, not only of the people of England but also of the whole of the United Kingdom. A party seeking interdict (as distinct from damages) was not able to proceed unless his title was free from prima facie objections. Lord Cockburn was the most trenchant member of the Second Division, and his language hints at, not only a degree of covert anti-English but also anti-patent sentiment in the decision:

Had the patentee wished to secure his patent in Scotland, he should have taken it out there. But instead of this, he took it out in England only, although he knew that he could not get it without publishing his invention to all and sundry. He neglects to stop the ears and mouths of the people of Scotland by a patent; and then, when he afterwards wants one, he says, ‘I published this invention only in England, and you in Scotland had no right to hear.’ I give no opinion upon the merits, but I am clear that this is not a case for interdict.<sup>25</sup>

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<sup>25</sup> (1852) 14 D at 829.

A predisposition towards as unified an approach as possible also became apparent in questions about procedure, pleading and evidence in patent cases. From the decision of the House of Lords in *Astley v Taylor* in 1821 on,<sup>26</sup> it became standard practice in Scotland, as it already was in England, for patent infringement actions to be heard before a civil jury, although this mode of trial or proof had only been introduced to Scotland in 1815 and patent actions were not listed amongst the causes which by statute from 1819 had to be taken before jurors as well as a judge. This Jury Court procedure required the court to set out the issues to be determined by the jury, and practice evolved from the formulations initially laid down in the *Astley* case. In *Neilson v Househill Coal and Iron Co*<sup>27</sup> in 1842, the issue initially proposed on the question of the validity of the pursuer Neilson's patent was, 'whether N was the true and first inventor of the said *machinery and apparatus* for which the said letters-patent were granted' (emphasis supplied); this was said to be the standard way of expressing such issues in Scotland. But the pursuer objected and argued that the issue should be 'whether N was the true and first inventor of the *invention* for which the said letters-patent were granted' (emphasis again supplied). Neilson's basic point was that the scope of his patent, which was for 'for the improved application of air to produce heat in furnaces', and was of considerable importance in iron manufacture, extended beyond the machinery by which the effect was achieved. He claimed that his form of issue was the recognised English form of pleading on this point, with the advantage that it could be used whether the patent was for machinery, a process or a principle of art and manufacture. It would also, of course, help give a wide scope to his patent if the jury found for him. The issue finally approved by the court – "Whether the invention, as described in the said letters-patent and specification, is not the original invention of the said N?" - went most of the way with Neilson's arguments.

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<sup>26</sup> *Astley v Taylor* (1821) 1 Shaw's App Cas 54.

<sup>27</sup> *Neilson v Househill Coal and Iron Co* (1842) 4 D 470.



Neilson's knowledge of English pleading and procedure probably owed something to the knowledge built up as a result of parallel proceedings in England on the English patent for his invention.<sup>28</sup> Similarly the pursuer in *Russell v Crichton*<sup>29</sup> held parallel Scottish and English patents and in a Scottish infringement action requested the court to follow English practice illustrated from his own previous actions south of the border,<sup>30</sup> by ordering an inspection of the defender's works by persons of skill. Despite the defender's argument that the inspection would deprive its own secret manufacturing processes of their value, the First Division ordered the inspection, holding that without such a procedure patents might be infringed with impunity. Safeguards were put in place for the defender: the inspection was to be of both parties' works at the sight of the sheriff and in presence of each party's solicitor, with the viewers also being charged not to use any private information obtained except for the purpose of giving evidence. Again, however, remaining abreast of English practice was clearly important for the court.<sup>31</sup>

There were, however, technical obstacles in the way of a completely unified and uniform approach to patents across the United Kingdom. Possibly the problem that arose in *Grover, Baker & Co v Hunter & Barr*<sup>32</sup> was relatively easy to overcome. Here an English domiciliary had taken out a Scottish patent and assigned it to a manufacturer in the USA, using the English form of an indenture or collateral deed, signed only by the patentee. The assignees obtained an interim interdict against alleged infringers in Glasgow despite arguments that they had not shown a good

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<sup>28</sup> See *Neilson v Harford* (1841) 11 LJ Ex 20. For Neilson's further reported litigations in defence of his Scottish patent see *Neilson v Househill Coal and Iron Co* (1842) 4 D 1187 (six-day jury trial); (1842) 5 D 86 (bill of exceptions rejected by Second Division); (1843) 2 Bell's App Cas 1 (House of Lords, reversing Second Division in part and ordering retrial); also *Baird & Co v Neilson* (1842) 1 Bell's App Cas 219 (House of Lords); *Neilson v Baird & Co* (1843) 6 D 51 (nine-day jury trial, bill of exceptions rejected by First Division).

<sup>29</sup> *Russell v Crichton* (1837) 15 S 1270. On James Russell see Dutton, *Patent System*, 74, 136, 157, 162, 181, 182.

<sup>30</sup> As cited in the report, the English cases were *Russell v Cowley and Dickson*, Repertory of Arts (Law Reports), vol XVII, p 168; *Russell*, Nov 21, 1834, Crompton, Neesom and Roscoe's Reports, vol 1, p 64.

<sup>31</sup> For subsequent interdict proceedings see *Russell v Crichton* (1837) 16 S 1155.

<sup>32</sup> *Grover, Baker & Co v Hunter & Barr* (1854) 26 Sc Jur 543 (First Division).

title to the patent under Scots law; the answer, that no formal proof of title was required in interim interdict proceedings, along with the observation that the deed would have provided good title in English law and the provision of caution (a guarantee) by the assignees, was upheld by the Court of Session.

More complex were the cases which arose from the patents legislation passed by the Parliament of Great Britain in 1835 (Lord Brougham's Act) and 1852 (the Patent Law Amendment Act). One of the many points in *Neilson v Househill Coal and Iron Co* concerned the defender's attempt, after the parties' written pleadings and the jury issues had been finally adjusted to go to trial, to lodge a note of objections under section 5 of the 1835 Act, stating, inter alia, that Neilson was not the first and true inventor and that the invention was known and publicly practised both in Scotland and England prior to the date of the letters-patent. This the defender proposed to prove by witness at the trial. The trial judge refused to allow this step, however, and was affirmed, first by the Second Division and then by the House of Lords. Section 5 of the 1835 Act, it was held, was intended to fit into English pleading and procedure only, and had no application to the very different Scottish system.

Despite its abolition of separate patents north and south of the border, the Patent Law Amendment Act 1852 was much more careful than its 1835 predecessor to take explicit account of the Scottish legal system. So for example where Lord Brougham's Act of 1835 referred only to the English procedure of *scire facias* as the means of invalidating a patent, section 43 of the 1852 Act made clear (presumably for the avoidance of doubt) that 'proceedings in Scotland to repeal letters patent are to be actions of reduction at the instance of Her Majesty's Advocate, or at the instance of any other party having interest with the concurrence of Her Majesty's Advocate, which

concurrence Her Majesty's Advocate is authorized and empowered to give upon just cause shown only'.<sup>33</sup> But the 1852 Act nevertheless ran into trans-jurisdictional difficulties in *Knox v Paterson*.<sup>34</sup> Under section 1 of the 1835 Act a patentee or his assignee could enter a disclaimer or alteration of the patent specification having obtained the consent of an appropriate Law Officer for the jurisdiction in which the patent applied: the Attorney General in England, the Lord Advocate or the Solicitor General for Scotland north of the border, and the Attorney General and Solicitor General in Ireland. The 1852 Act continued the procedure for the new United Kingdom patent, but the statutory language failed to make clear whether the patentee now needed the consent of the Law Officers for all three jurisdictions, or the consent of any one of them, or the consent of the Law Officers for the territory in which the patentee was domiciled. Having enjoyed pointing up the infelicities of the drafting of the 1852 Act, the Court of Session, perhaps rather limply, took the common sense line that the Attorney General's consent was enough and that the patentee had no need to seek the leave of the Lord Advocate or the Solicitor General for Scotland as well. But given the centralisation of the patent system as a whole in London, the effect of the decision must have been to eliminate any residual role the Scottish Law Officers might still have had – probably to their considerable relief.

### **(3) Placing patents and copyright in the framework of Scots law**

As patents for invention grew in practical significance from 1750 on, so writers on Scots law were compelled to take cognisance of them, and put these rights within the general structures of their expositions, which were of course usually based on Civilian systematics. For this purpose patents

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<sup>33</sup> For a decision on this section, holding the Lord Advocate's concurrence invalid unless he had actually applied his mind to the question before giving it, see *Gillespie v Young* (1861) 23 D 1357.

<sup>34</sup> *Knox v Paterson* (1857) 20 D 40.

were usually yoked together with copyright. In 1751 Andrew McDouall (Lord Bankton) placed a brief discussion of the two rights in his chapter on 'Permutation and Sale', referring to them as 'exclusive privileges' limiting the general freedom of commerce along with rules privileging markets and fairs and criminal provisions on selling of counterfeit drink and the use of false weights and measures.<sup>35</sup> He also noted that grants to 'the inventors of new manufactures, or authors of books, securing to them the sole benefit of the same' did not fall foul of the common law's prohibition on monopolies, being 'in vertue of statute' (presumably the Statute of Monopolies and the Statute of Anne, although Bankton does not name them specifically) and 'limited to a certain period of years, after which they determine'.<sup>36</sup> Lord Kames likewise treated patents and copyright as an aspect of the regulation of commerce in his *Principles of Equity*, first published in 1760,<sup>37</sup> and observed that the only lawful monopolies were those granted for the public good. Patents for inventions and copyright for books, 'limited to a time certain', were examples: 'the profit made in that period is a spur to invention: people are not hurt by such a monopoly, being deprived of no privilege enjoyed by them before the monopoly took place; and after expiry of the time limited, all are benefited without distinction.'<sup>38</sup>

Later writers discussed patents and copyright, not within the law of personal rights or obligations, or in conjunction with aspects of market regulation, but rather as part of the law of real rights, or property (using that word in a very broad generic sense).<sup>39</sup> The concept of 'exclusive privilege' as a form of real right began to develop. Lecturing on jurisprudence to moral philosophy students at Glasgow University in the 1760s, Adam Smith analysed the four real rights of the Civil Law

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<sup>35</sup> On the civil protection of trade marks in this period, see further below, 000.

<sup>36</sup> Bankton, *Institute*, I, xix, 11.

<sup>37</sup> Henry Home, Lord Kames, *Principles of Equity* 3rd edn, (Edinburgh, 1778), Book II Chapter III.

<sup>38</sup> *Ibid*, vol 2, 99.

<sup>39</sup> For the doctrine of real rights in Scots law at this time, see Hume, *Lectures*, vol 2, 2-3

(Property [i.e. in its more precise meaning of Ownership], Servitude, Pledge and Inheritance), and argued that the last of these could only be considered as a distinct real right in the context where the heir was preparing to take up his right following the death of the previous proprietor, since his privilege to inherit excluded the right of any others who would be heirs after him. On this analogy, 'all other exclusive privileges have the same title, and appear evidently as well as it to be real rights'.<sup>40</sup> Some exclusive privileges, such as inheritance, or that of the hunter to the pursuit of his prey, were founded on natural reason, but 'the greatest part ... are the creatures of the civil constitutions of the country'; and amongst them were to be placed patents for inventions and copyright.<sup>41</sup>

David Hume, Professor of Scots Law at Edinburgh 1786-1822, in his lectures likewise categorised patents and copyright as 'instances of the real right of Exclusive Privilege', which he seems to have conceived of as an 'exclusive title ... to perform a certain operation ... for and within a certain territory of land, and to draw the profit attached to that operation'. Any other person presuming to perform the operation was guilty of 'usurpation ... infringement of the exclusive privilege', and the holder was entitled to vindication, meaning that the right was 'thus marked with all the characters of a proper legitimate and real right'.<sup>42</sup> Other examples included the trading monopolies and privileges of royal burghs, merchant guilds and incorporated crafts.

George Joseph Bell, Hume's successor in the Edinburgh Chair from 1822 to 1837, also treated patents and copyrights as real rights, or as 'estates available to creditors',<sup>43</sup> but more or less abandoned the concept of 'exclusive privilege' in favour of seeing the rights as ones of property,

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<sup>40</sup> Adam Smith, *Lectures on Jurisprudence*, (Oxford, Oxford University Press, 1979) 82.

<sup>41</sup> Smith, *Lectures*, 82-83.

<sup>42</sup> Hume, *Lectures*, vol 4, 38 (exemplified with thirlage and inheritance rights).

<sup>43</sup> Bell, *Commentaries*, vol 1, 103.

albeit in a somewhat opaque passage suggesting that the right of ownership was less than full-blown:

The right to enjoy the benefit of a useful invention, or literary composition, seems to rest securely on the great foundation on which property depends; namely, occupancy, with skill, labour, expense and intellectual exertion, employed in the acquisition of production. But a more narrow view has been taken of this matter, and instead of considering the invention or the composition as itself the subject of property, it has been held that, as the purchase of the individual machine, or book gives the power of imitating or of copying it, either such copy or the original may be sold, and so copies multiplied to make gain. With this view, in the case of discoveries in the useful arts, concurs the interest which the public has to prevent the undue raising of prices, and restraining of industry and improvement, according to the caprice or self-interest of monopolists. The Legislature has therefore interposed, on the one hand to secure for a certain but limited time, to the authors of useful inventions, or of literary compositions, a monopoly of sale and profit; and on the other to protect the interests of the public.<sup>44</sup>

On patents specifically, Bell added elsewhere:

The right is useful as property in these respects: 1. It secures to the patentee the profits of the sale of the thing invented. 2. The privilege may be assigned in whole or in part. The patent generally bears a restriction not to be communicated to more than five. But the whole privilege may be sold.<sup>45</sup>

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<sup>44</sup> Bell, *Principles*, § 1348. Bell's *Commentaries* refers to the 'exclusive privilege of patent or copyright' in a sub-heading (at 120).

<sup>45</sup> Bell, *Commentaries*, 105.

The inter vivos transferability of patents and copyrights was certainly a significant point of difference from many of the other forms of exclusive privilege mentioned by Smith and Hume.

Hume and Bell both clearly, and without much discussion, considered patents and copyrights to be incorporeal rights. Hume also raised, without answering, the question of whether the rights were to be considered as heritable rather than moveable rights;<sup>46</sup> that is to say, as rights that passed on the death of the holder to that person's heir-at-law rather than to that part of the deceased's estate which would be administered by executors and could be bequeathed by will subject to the legal rights of the deceased's descendants and surviving spouse. In 1832 John Shank More, an advocate later to be Bell's successor in the Scots Law Chair at Edinburgh, argued that the rights were heritable,<sup>47</sup> his approach being based on the heritability of rights (such as pensions and annuities) with a tract of future time – 'rights of such a nature that they cannot be at once paid or fulfilled by the debtor, but continue for a number of years, and carry a yearly profit to the creditor while they subsist, without any relation to any capital sum or stock'<sup>48</sup> – and the fit between this definition and patents and copyrights. Bell appeared to accept the analogy in his *Commentaries*, with one consequence being that the rights could only be attached by the process against heritage known as adjudication;<sup>49</sup> the forms of attachment for moveables, in particular arrestment, were not available to the holder's creditors. But the analysis was not consistently maintained throughout Bell's writings, for his *Principles* brought the substantive treatment of the rights under the general heading 'Property in moveables' and a further sub-heading 'Of incorporeal moveable subjects'.

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<sup>46</sup> Hume, *Lectures*, vol 4, 565.

<sup>47</sup> JS More, *Notes on Stair* (Edinburgh, 1832), cxli (Note R(4)).

<sup>48</sup> The definition of Erskine, *Institute*, II, 2, 6.

<sup>49</sup> Bell, *Commentaries*, vol 1, 110-111. See also *Principles*, § 1480.

While copyrights were finally declared to be moveable property in the Copyright Act 1842,<sup>50</sup> the question of classification of patents was not settled for Scots law until *Advocate-General v Oswald*<sup>51</sup> in 1848. In this case about duty payable on legacies, the Exchequer Court held that patents were moveable property, rejecting the arguments about rights with a tract of future time. The Court's view was based upon the terms of the patent grant, which was expressly made, not just to the patentee, but also to his executors, administrators and assigns. The leading judgment was delivered by Lord Murray:

Subjects, however, become heritable or moveable according to their destination. Where that is clear it is decisive. ... I must confess, that after the evidence we have had in this case, it seems to me very difficult to trace any resemblance between the profits arising from the exclusive privileges conferred by a patent, and those arising from a pension or annuity. There is, perhaps, no trade of which the returns are more uncertain and precarious than the profits arising from a patent. A great many patents produce nothing; and sometimes the expenses of enforcing the exclusive right exceed the returns. I cannot, therefore, acknowledge the resemblance between the profits which may arise from a patent and a yearly annuity or feudal estate. ... [T]he terms of the warrant and letters patent ... make it clear, beyond the possibility of dispute, that every such Scotch patent is a moveable right, which goes to executors.<sup>52</sup>

Doubtless a further factor in the Court's conclusion in *Oswald*, however, was its observation that patent rights were classified as personal rather than real property in English law.

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<sup>50</sup> Section 25.

<sup>51</sup> *Advocate-General v Oswald* (1848) 10 D 969. This case also arose from the Neilson patent (above, 000), and reflects its ultimate financial success in various settlements of 1843 and 1844, for which see the ODNB article 'Neilson, James Beaumont (1792-1865)'. The decision is only grudgingly accepted by More in his *Lectures on the Law of Scotland* (Edinburgh, 1864), vol 1, 452.

<sup>52</sup> (1848) 10 D at 978-9.



#### **(4) Literary property in Scotland and the Battle of the Booksellers**

We may now turn back to the history of copyright in Scotland. Although the Stationers Hall registration requirements of the Statute of Anne might have made life more difficult for Scottish publishers and authors, in practice Scottish publications seem to have been frequently entered in the register throughout the eighteenth century, so the barriers were not insuperable, at least for those with resources and good prospects of literary success.<sup>53</sup> In the mid-eighteenth century, however, London and Scottish publishers and book-sellers fell into conflict over a number of issues about literary property. The issues first arose from the making, import and export by the Scots of cheap reprints of works with subsisting registrations in Stationers Hall, where the question was whether the Statute's very limited sanctions against infringement – forfeiture of the infringing publications and payment of one penny for every infringing sheet, half going to the Crown, the other to the person suing – could be supplemented by the remedies of interdict (Scottish equivalent of the injunction), claims to the infringer's profits, and damages. The most elemental question of all, however, was about works whose term of protection under the Statute of Anne had expired, or which had never been registered. Was there still subsisting in the work a common law right which could be invoked to prevent it becoming freely available to all for the purposes of republication?

From the start, the answers given to these questions by the Court of Session differed fundamentally from those of the English judiciary. Where the London booksellers succeeded in persuading the Court of Chancery to grant injunctions and order infringers to disgorge their

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<sup>53</sup> Mann, *Scottish Book Trade*, 123-124; RB Sher, *The Enlightenment and the Book: Scottish Authors and their Publishers in Eighteenth-Century Britain, Ireland, and America* (Chicago, Chicago University Press, 2006), 243-4.

profits,<sup>54</sup> the Scottish judges ultimately refused to supplement the Statute of Anne in this way in the case of *Midwinter v Hamilton*,<sup>55</sup> decided in 1748. An appeal to the House of Lords failed, not by upholding the court below, but by finding instead that the action ‘was improperly and inconsistently brought’ because the appellants had illegitimately cumulated non-statutory with statutory remedies as well as suing several defenders in one claim when the points at issue against each were about separate and distinct books and rights therein. The case was remitted back to the Court of Session, but no further litigation ensued there.<sup>56</sup> Dr McDougall comments that ‘from the middle of the century until 1774 ... the strategy of the London booksellers was to let well enough alone north of the border and to take action only in England or the English courts’;<sup>57</sup> but these English actions might be against English provincial booksellers selling Scottish reprints.<sup>58</sup> Henry Home, counsel for the Scottish booksellers in *Midwinter* and later appointed to the bench as Lord Kames, referred to his past triumph at the bar in his monumental *Principles of Equity*, implicitly criticising the English equity courts in arguing that statutes granting monopolies, like the Statute of Anne, should not be extended in equity: ‘monopolies or personal privileges cannot be extended by a court of equity; because that court may prevent mischief, but has no power to do any act for enriching any person, or making him *locupletior*, as termed in the Roman law.’<sup>59</sup>

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<sup>54</sup> See R Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-century Britain (1695-1775)* (Oxford, Hart Publishing, 2004), 57-69, 137-8; T Gomez-Arostegui, ‘What History Teaches Us about Copyright Injunctions and the Inadequate Remedy-at-Law Requirement’, (2008) 81 *University of Southern California Law Review* 1197.

<sup>55</sup> *Midwinter v Hamilton* 1748 Mor 8295; Deazley, *Right to Copy*, 116-32. Note also Bankton, *Institute*, I, xix, 12. Bankton’s publishers were the booksellers who would feature in the major Scottish copyright cases of the period, Alexander Kincaid and Alexander Donaldson; for their partnership see Sher, *Enlightenment and the Book*, 311-6.

<sup>56</sup> *Millar v Kincaid*, unreported; see Deazley, *Right to Copy*, 130-2.

<sup>57</sup> W McDougall, ‘Copyright Litigation in the Court of Session, 1738-1749, and the Rise of the Scottish Book Trade’ (1971-87) 5 *Transactions of the Edinburgh Bibliographical Society* 2, 9.

<sup>58</sup> J Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (London, Mansell, 1994), 83.

<sup>59</sup> Kames, *Equity* 1st edn (Edinburgh, 1760), 185. The statement, or something close to it, reappears in subsequent editions (2nd edn, 1767, 265-266; 3rd edn, 1778 (last prepared by Kames himself), vol 2, 126. Later editions reproduce the text of the 3rd.

The Scottish courts maintained this refusal to extend the remedial structure of the Statute of Anne, whether through the common law or equity, until the beginning of the nineteenth century,<sup>60</sup> when the House of Lords in *Cadell v Robertson*, a Scottish appeal about the rights in a book not registered at Stationers Hall, overturned the view of the Court of Session that no action was competent in such a case.<sup>61</sup> Lord Chancellor Eldon observed that the Statute was ‘uniformly administered ... in this country’,<sup>62</sup> and cited the 1798 King’s Bench decision in *Beckford v Hood*<sup>63</sup> as deciding that unregistered authors nevertheless had the rights given by the Statute and could obtain injunctions and damages for infringement. Eldon added:

The judges in Scotland say truly, that they ought not to decide as the judges in England decide, unless they decide rightly and according to the law of Scotland. On the other hand, we may say, that if the judges in Scotland have not decided right, they are not to be followed; and in my own view, they have misunderstood the meaning of the statute in this instance.<sup>64</sup>

It was presumably by way of silent comment on this passage that its reporter provided as an appendix the text of the judicial opinions in an earlier Scottish case not mentioned by Lord Eldon, *Hinton v Donaldson*,<sup>65</sup> decided in 1773. There, as is now well known, nine out of ten Court of Session judges altogether held that literary property, or copyright, had no existence in relation to

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<sup>60</sup> See *Payne and Cadell v Anderson and Robertson* 1787 Mor 8312 (where however interdict and damages were granted on the basis that the defenders had committed the wrong of counterfeiting the pursuers’ book; see further below, note 111).

<sup>61</sup> *Cadell v Robertson* (1811) 5 Pat 453. For the Court of Session pleadings, see Session Papers, Advocates Library, Edinburgh, vol 52 (Hume Collection), no 5. Note that George Joseph Bell was counsel for the pursuers in the Court of Session.

<sup>62</sup> (1811) 5 Pat at 504.

<sup>63</sup> *Beckford v Hood* (1798) 7 D&E 620.

<sup>64</sup> (1811) 5 Pat at 504.

<sup>65</sup> *Hinton v Donaldson* 1773 Mor 8307; more fully at 5 Br Supp 508; and most fully of all at 5 Pat 505 and in J Boswell, *The Decisions of the Court of Session upon the Question of Literary Property in the Cause John Hinton of London, bookseller, against Alexander Donaldson and John Wood, booksellers in Edinburgh and James Meurose, bookseller in Kilmarnock* (Edinburgh, 1774). Quotations and citations below are from this last source.

published works except under the Statute of Anne. There was no such thing as copyright at common law in Scotland. The court refused to follow the contrary decision handed down by the Court of King's Bench in 1769, *Millar v Taylor*.<sup>66</sup> It also anticipated by a year the reversal of *Millar v Taylor* by the House of Lords' decision in *Donaldson v Beckett*.<sup>67</sup>

As Ronan Deazley has pointed out, however, the arguments supporting the decision in *Hinton v Donaldson* have a flavour quite distinct from those in *Donaldson v Beckett*, flowing from the powerful Civilian influence on Scottish legal thinking. Dr Deazley draws attention to 'three central tenets' in the opinions of the Court of Session judges: 'a common law copyright was deemed to have no foundation either in the law of nature, or the law of nations, nor was any vestige of such a right to be found in the law of Scotland.'<sup>68</sup> In an as yet unpublished paper that my colleague Professor John Cairns has kindly shared with me, however, Dr Deazley's point is elaborated and reshaped in so far as it distinguishes the law of Scotland from the law of nature or the law of nations.<sup>69</sup> Professor Cairns points out that for the Scots lawyer the 'common law' was closely linked to European ideas of the *ius commune* as the *ius gentium*, Roman law and, ultimately, the *ius naturale*. Natural law was not something separate from, but was rather the foundation of Scots law.<sup>70</sup> Its content was to be determined by looking at what men in general understood and accepted as well as the laws of other peoples and nations – the *ius gentium*. As Lord Gardenston

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<sup>66</sup> *Millar v Taylor* (1768) 4 Burr 2303.

<sup>67</sup> *Donaldson v Beckett* (1774) 4 Burr 2408, 2 Bro PC 129. See further RS Thompson, 'Scottish Judges and the Birth of British Copyright' 1992 JR 18; Deazley, *Right to Copy*, 191-210; B Sherman and L Bently, *The Making of Modern Intellectual Property Law* (Cambridge, Cambridge University Press, 1999), 11-42.

<sup>68</sup> Deazley, *Right to Copy*, 185. Natural law was seriously discussed in the English cases *Tonson v Collins* (1761) 1 W Bl 301 and *Millar v Taylor* (1769) 4 Burr 2303: see DJ Ibbetson, 'Natural Law and Common Law' (2001) 5 Edin LR 4 at 11-12.

<sup>69</sup> J W Cairns, 'Natural Law and Copyright in Eighteenth-century Scotland', unpublished draft.

<sup>70</sup> Note also Lord Alva's comment, reflecting another aspect of a more positivistic if also traditional understanding of the place of Roman law in the structure of Scots law: 'the Roman law, which our statute-book teaches us to acknowledge by the name of the common law of this ancient kingdom; in which the ideas of literary property do not seem to have been objects of attention in any considerable degree' (Boswell, *Decisions*, 32).

put it, ‘the most substantial and convincing evidence of what is really just and rational, in a matter of public concern to all countries, is the concurring sense of nations.’<sup>71</sup> For this purpose the law of England could of course be considered, but if that law was the only system to recognise a right of literary property outside statutory provision or the grant of a special privilege, then it was not very powerful support for the existence of such a right in Scots law. The absence of any previous reference to such a right in Scots law was also evidence that it was not a natural right, readily comprehended by all; indeed in Lord Gardenston’s words again, ‘property, when applied to ideas, or literary and intellectual compositions, is perfectly new and surprising’.<sup>72</sup>

A further point of significance in the *Hinton* opinions can be more readily identified as a result of our earlier discussion of the distinction drawn by contemporary jurists such as Adam Smith and, a little later, David Hume: between the real right of property – outright ownership – and the real right of exclusive privilege.<sup>73</sup> Several of the judges in *Hinton v Donaldson* refer to this distinction. Thus Lord Auchinleck distinguished prerogative from property and criticised ‘blending the notions arising from privileges and patents with a common-law right, which is quite erroneous’.<sup>74</sup> The Lord Justice Clerk, Lord Glenlee, recognised that ‘every civilized state in modern times has introduced exclusive privileges for authors’; but, he said, ‘this suggests no idea of an original property in the author; on the contrary, it is inconsistent with it: for if such property previously existed in the author, how should it have occurred to sovereigns, meaning to encourage authors, to limit the endurance of the author’s right to a certain term of years; which is the case of all letters patent known in the different states of Europe’.<sup>75</sup> For Lord Kames, ‘the meaning of property, in the laws

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<sup>71</sup> Ibid, 22.

<sup>72</sup> Ibid, 25.

<sup>73</sup> See above, 000.

<sup>74</sup> Boswell, *Decisions*, 5.

<sup>75</sup> Ibid, 15.

of all nations, is a right to some corporeal subject, that can be possessed, that can be transferred from hand to hand, that goes to heirs, that may be stolen or robbed, and that may be demanded by a real action, termed *rei vindicatio*.<sup>76</sup> But the right claimed by the pursuer was not to any corpus that could be possessed or stolen. He continued:

*Ergo*, it is not property. Taking it in all views, no more can be made of it than to be a privilege or monopoly, which intitles the claimant to the commerce of a certain book, and excludes all others from making money by it. The important question then is, from what source is this monopoly derived, a monopoly that endures for ever, and is effectual against all the world? The act of Queen Anne bestows this monopoly upon authors for a limited time upon certain conditions. But our legislature, far from acknowledging a perpetual monopoly at common law, declares that it shall last no longer than a limited time.<sup>77</sup>

Lord Gardenston thought that the ‘concurring sense of nations’ showed that the nature of an author’s right was ‘no more than a temporary privilege’<sup>78</sup> and not one of property. Lord Alva’s opinion is also to be understood as distinguishing privilege from property:

By the common law of this country, or any other country, where there is not a restriction upon natural liberty understood, either *tacito populi suffragio*, or by express statute, there is no antecedent property vested in an author, or his heirs, or assigns, further than what relates to the *ipsum corpus* of the MS: that this property, in so far as it exists, is merely a creature of civil society and refined policy, and consequently will go no further than it is expressly established by custom or

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<sup>76</sup> Ibid, 18.

<sup>77</sup> Ibid, 18.

<sup>78</sup> Ibid, 22.

statute: but we have no custom or common law for it here; and therefore it can go no further with us than it is carried by the statute.<sup>79</sup>

Another way in which the judicial arguments draw upon the idea of exclusive privilege to reject the claim of property is in their observation that the author of a book might be analogised with the inventor of a useful machine who, however, had no property right apart from the monopoly of a patent granted under the royal prerogative.<sup>80</sup> Indeed, the existence of such a perpetual property right in inventors would be deeply damaging to society and commerce; Lord Kames commented darkly that ‘it would be in the power of inventors to deprive mankind of both food and raiment’.<sup>81</sup>

For present purposes, a final important feature of the opinions in *Hinton v Donaldson* is that most were careful to distinguish between unpublished and published books. With the former, the judges were much more ready to recognise the existence of a property right. So for example Lord Auchinleck: ‘It is agreed by all, that while the book is not published, whether the work be in the author’s head or his cabinet, it is absolutely his, and no man can deprive him of it’;<sup>82</sup> and similarly the Lord Justice Clerk: ‘Before publication this copy-right in the author exists, and must have all the effects of property in every nation.’<sup>83</sup> As the sole dissentient judge, Lord Monboddo, pointed out,<sup>84</sup> however, they did not explain what happened to this property right upon publication of the work. Lord Kames, Lord Gardenston, Lord Coalston and Lord Alva also recognised a pre-publication property right, albeit on the basis of the ownership of the manuscript on which the work was recorded rather than anything more abstract or incorporeal. But the two latter judges also

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<sup>79</sup> Ibid, 32.

<sup>80</sup> See the opinions of the Lord Justice Clerk (Boswell, *Decisions*, 15), Lord Kames (ibid, 18-19), Lord Gardenston (ibid, 23-4), Lord Coalston (ibid, 29), and Lord President Dundas (ibid, 33). See also Lord Monboddo’s dissent at ibid, 12.

<sup>81</sup> Boswell, *Decisions*, 19.

<sup>82</sup> Ibid, 3.

<sup>83</sup> Ibid, 14.

<sup>84</sup> Ibid, 10.

recognised what Lord Coalston termed ‘full power’<sup>85</sup> and Lord Alva an ‘interest’<sup>86</sup> over, respectively, one’s ‘own ideas’ or the ‘productions of [one’s] own brain’. In both cases the judges were careful to distinguish this power or interest from property, but did not otherwise seek to define what if any legal effects arose from it. Further, to the eye of the modern copyright lawyer, they and their fellow judges failed in their discussion of property rights to distinguish adequately between ideas, forms of expression and the physical record of the work in question.<sup>87</sup>

The issues thus raised in *Hinton v Donaldson* about unpublished works quickly became a matter for decision in the Court of Session in relation to private correspondence.<sup>88</sup> In *Dodsley v McFarquhar*<sup>89</sup> in 1775, letters written by the Earl of Chesterfield to his son Philip Stanhope were, after the death of the two men, sold by the addressee’s widow to a London publisher who published them with the consent of the Earl’s executors. Before giving that consent, however, the executors had obtained from the Lord Chancellor in England an injunction against publication. The book was registered in Stationers Hall. The publishers were held entitled to an interdict against an unauthorised reprint by Edinburgh printers and booksellers, arguments that the Statute of Anne conferred no express right upon an author’s representatives after his death, and that neither the recipient nor the widow had such rights of property in the letters as would enable them to publish, being rejected by the court. While the recipient and then the widow might own the manuscripts, there was at least an implied prohibition of publication; and in some of the letters there was an express statement that they should remain secret. With regard to this latter point, the court

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<sup>85</sup> Ibid, 28.

<sup>86</sup> Ibid, 32.

<sup>87</sup> For contemporary uncertainty on these issues in England see Sherman and Bently, *Making of Modern Intellectual Property Law*, 15-42.

<sup>88</sup> For insightful discussion of contemporary social attitudes towards personal correspondence see K Williamson, ‘The Emergence of Privacy: Letters, Journals and Domestic Writing’, in I Brown et al (eds), *Edinburgh History of Scottish Literature Volume 2: Enlightenment, Britain and Empire 1707-1918* (Edinburgh, Edinburgh University Press, 2007).

<sup>89</sup> 1775 Mor 8308; more fully at ibid, Literary Property, Appendix, 1.



seems to have accepted the counter-argument that it was for the sender's representatives to take the point about obligations of secrecy, not those who sought to give the material further public circulation. But the court does not seem to have relied upon any notion that the sender retained any right of property in the letters, whether in reference to the original manuscripts or their content.

The next case was *Cadell and Davies v Stewart*, decided in 1804.<sup>90</sup> Six years after the death of the poet Robert Burns in 1796, a Glasgow publisher projected the publication of a volume of his letters to Agnes McLehose, a close friend whom he addressed as 'Clarinda' (dubbing himself 'Sylvander'). Clarinda, the publisher claimed, consented to the publication.<sup>91</sup> London and Edinburgh booksellers who had acquired rights to all Burns' works and also had the concurrence of the Burns family successfully sought interdict to stop the publication. Their argument, put forward by George Joseph Bell advocate, and based on English authorities such as *Pope v Curl*<sup>92</sup> and *Duke of Queensberry v Shebbeare*,<sup>93</sup> was that an addressee such as Clarinda acquired only a limited property right in a letter, with no right to use it in any other way than as manuscript. No reconciliation was attempted between this limited property right and the traditional Scots law view of ownership as the most absolute of all rights, capable of being vested in only one person at a time. But, crucially, the concurrence of the Burns family also enabled a further argument, based on their interest in preventing injury to Burns' character and reputation. The respondent argued that the recipient had full and unfettered property in the letters, and even if their publication was

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<sup>90</sup> *Cadell and Davies v Stewart* 1804 Mor, Literary Property, Appendix, 13. More details can be obtained from the Session Papers available in the Advocates Library, Edinburgh: see vol 52 (Hume Collection) no 6 (including a handwritten note of the judges' opinions, possibly by Hume himself); vol 65 (Blair Collection) no 13; vol 114 (Campbell Collection) nos 2-3; and Faculty Collection February 1804-July 1804, no 166.

<sup>91</sup> Doubt as to the reality of her consent emerges from the pleadings for *Cadell and Davies* as found in the Session Papers, but the court did not need to make any findings on the matter.

<sup>92</sup> *Pope v Curl* (1741) 2 Atk 342.

<sup>93</sup> *Duke of Queensberry v Shebbeare* (1758) 2 Eden 329.

detrimental to Burns' reputation, that could not restrict the owner's legal use of her property. Breach of confidence was an argument of morality, not law: 'whoever intrusts any secret, or makes any communication to another, commits himself in some measure to the discretion of his friend, and he can never hope, by means of a suspension and interdict, to prevent him from telling the secret.'<sup>94</sup> The court's opinions are not reported, but the reporter noted 'little difference of opinion upon the Bench'<sup>95</sup> and summarised the decision as follows:

The ground upon which the Court seemed to pronounce the decision was, That the communication in letters is always made under the implied confidence that they shall not be published without the consent of the writer, and that the representatives of Burns had a sufficient interest, for the vindication of his literary character, to restrain this publication.<sup>96</sup>

Discussing these cases alongside the English authorities in his lectures, Hume observed that 'it seems obvious that letters are written and conveyed under the implied condition of not being published without the consent of the writer, who in that respect has certainly no intention of transferring the property of what he writes'.<sup>97</sup> But although Bell thought that 'unpublished compositions are property at common law; and the publication of them is an invasion of the rights of the owner',<sup>98</sup> he also argued that the basis of the Scottish decisions on the publication of private letters specifically was not the same as the English cases on the subject:

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<sup>94</sup> *Cadell and Davies v Stewart* 1804 Mor, Literary Property, Appendix, 16.

<sup>95</sup> *Ibid*, 16.

<sup>96</sup> *Ibid*, 16. The contemporary note of the judicial opinions in Session Papers, vol 52 (Hume Collection) no 6, shows the judges rejecting property arguments.

<sup>97</sup> Hume, *Lectures*, vol 4, 68.

<sup>98</sup> Bell, *Principles*, § 1356.

The law of England and that of Scotland proceed on different grounds in denying the right to publish letters. In England, it is on the ground of property alone; in Scotland, on the ground chiefly of a just and expedient interference for the protection of reputation.<sup>99</sup>

The argument was reiterated in more detail in Bell's *Commentaries*:

In Scotland, the Court of Session is held to have jurisdiction, by interdict, to protect not property merely, but reputation, and even private feelings, from outrage and invasion. ... By the publication of such effusions, confidential, careless, unthinking of consequences, a man may be wounded in the tenderest part; his literary reputation hurt; his character traduced. It is, accordingly, the understood or implied condition of the communication, the implied limitation of the right conferred, that such communications are not to be published.<sup>100</sup>

Bell also noted that 'doubts seem to be entertained in England, whether letters falling into the hands of the assignees of bankrupts could be secured from publication by injunction'. 'With us,' he wrote, 'I think, there would be no such doubt.'<sup>101</sup>

Bell's distinction between an author's right of property in an unpublished work and a letter-writer's entitlement to control publication of the letter to protect reputation was largely borne out in the limited subsequent case law. An 1855 jury case held the writer of a letter to a newspaper editor for publication entitled to withdraw it before publication, albeit without reference to Bell.<sup>102</sup> In 1881 the Second Division discharged an interdict against publication of personal

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<sup>99</sup> Ibid.

<sup>100</sup> Bell, *Commentaries*, vol 1, 111-12.

<sup>101</sup> Bell, *Commentaries*, vol 1, 112. See also *ibid*, 114, for more expansive use of interdict in Scotland than would be possible with injunctions in England.

<sup>102</sup> *Davis v Miller and Fairly* (1855) 17 D 1166.

correspondence (while noting that there might be a remedy after publication if injury was caused thereby); but the judges, although thinking the rules to be the same in England and Scotland, cited Bell and were clear that there was no property, literary or otherwise, in the letters.<sup>103</sup> Four years later, in the great case of *Caird v Sime*,<sup>104</sup> which concerned the unauthorised publication of the lectures of the Professor of Moral Philosophy at Glasgow University, the judges of the Whole Court of Session were virtually unanimous in declaring that the author of an unpublished work had a right of property in his work, citing mainly the English authorities on the matter and in particular *Abernethy v Hutchinson*,<sup>105</sup> *Prince Albert v Strange*,<sup>106</sup> and *Jefferys v Boosey*.<sup>107</sup> This view was upheld in the House of Lords, where the leading speech was given by the Scottish Law Lord, Watson.<sup>108</sup> But all were clear that this property right was not copyright, and that it ceased upon publication. How this might be reconciled with the Scots law concept of property – ownership – as single, undivided and indefinite in duration was, however, never addressed.

## **(5) Conclusion**

Only the most general of conclusions may be offered from this sketchy survey of its subject, based as it is almost entirely on printed formal legal sources. A significant Scottish dimension is apparent in the development of what we would now call intellectual property in the United Kingdom after the Union of 1707. With both patents and copyright under the Statute of Anne, however, that Scottish dimension was always seen in the context of the single market created by the Union; and this was occasionally reinforced by the House of Lords in cases such as *Roebuck and Garbett v*

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<sup>103</sup> *White v Dickson* (1881) 8 R 896.

<sup>104</sup> *Caird v Sime* (1885) 13 R 23. Only Lord Shand of the 13 consulted judges rejected the property analysis.

<sup>105</sup> *Abernethy v Hutchinson* (1825) 1 H & TW 28.

<sup>106</sup> *Prince Albert v Strange* (1849) 1 M&G 25.

<sup>107</sup> *Jefferys v Boosey* (1854) 4 HLC 815.

<sup>108</sup> *Caird v Sime* (1887) 14 R (HL) 37.

*Stirlings*, *Cadell v Robertson*, and *Astley v Taylor*, as well as by the legislature. In Scotland itself there were also issues about how to understand these developing rights within the systematics of Scots law, in particular the doctrine of real rights. While this did not prevent the development of a unified substantive patent law for the United Kingdom long before the abolition of separate Scots and English patents in 1852, there were significant effects in the debate about the existence of rights at common law, beyond grants made under the royal prerogative or by virtue of United Kingdom legislation. The effects were not limited to the literary property arena. The notions of protecting reputation and privacy rather than rights of property also helped from early in the nineteenth century to go well beyond an existing *ius commune* idea of the professionally entrusted secret that could not be disclosed by the recipient,<sup>109</sup> to follow the English development of a concept of a right to protect confidentiality, preventing or sanctioning the taking and use or disclosure of another's confidential information.<sup>110</sup> Similarly the unauthorised use of badges of another's trading identity and reputation, successfully challenged in 1787 using the analogy of the *crimen falsi*,<sup>111</sup> and seen by Bell as resting on 'tak[ing], without authority, the advantage of [the pursuer's] personal character and credit as an artist',<sup>112</sup> would provide the platform from which Scots law would move in the second half of the nineteenth century to use the English concept of passing off (reinforced by the statutory protection of trade marks available throughout the United Kingdom from 1875). But in both common law developments it generally remained clear (as it did not with literary property) that their basis in Scots law was in personal rights, whether by way of delict or contract, and not in any form of property in the confidential information or the badges of

<sup>109</sup> See J Blackie, 'The History of Personality Rights in Scots Law', in N Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law* (Dundee, Dundee University Press, forthcoming), section 2.2.5.

<sup>110</sup> *Kerr v Duke of Roxburgh* (1822) 3 Murr 126, said by the judge to be 'the first case of the kind in this country' (at 141). See also *Newton v Fleming* (1846) 8 D 677, revd (1848) 6 Bell 175, *AB v CD* (1851) 14 D 177, and Blackie, 'Personality Rights', section 2.3.6.

<sup>111</sup> *Payne and Cadell v Anderson and Robertson* 1787 Mor 8312.

<sup>112</sup> Bell, *Commentaries*, vol 1, 111, citing *Wilkie v McCulloch* (1823) 2 S 413 (interdict to prevent representation that ploughs manufactured under inspection or by authority of pursuer who had invented, but not patented, new kind of plough). See also *Edinburgh Correspondent Newspaper* (1822) 1 S 407 (protection of newspaper title).

identity.<sup>113</sup> It was, however, always a comfort for the Scottish courts that here, as with patents and copyright, the results produced by this different approach were generally in line with those that would be reached in England. The United Kingdom was the inescapable backcloth to the development of intellectual property law; and for Scots law that did indeed mean, to adjust the metaphor first coined by Pierre Trudeau, being on stage with an elephant.

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<sup>113</sup> See EM Clive, 'The Action for Passing Off: Its Scope and Basis' 1963 JR 117; Scottish Law Commission Memorandum No 40, *Confidential Information* (1977).